United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-7192

United States Court of Appeals

FOR THE SECOND CIRCUIT

HAROLD AMES,

Plaintiff-Appellant,

—against—

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. and CHRISTOPHER V. STREIT,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S BRIEF

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Proposed 10-6-77

HAROLD AMES V. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. & ANO.
SHORT TITLE

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TYPE OF CASE
- ☐ U.S. Civil
- ☐ Bankruptcy
- ☐ Criminal
- ☐ Original proc. ☐ Administrative
- ☒ Private Civil
- ☐ Prisoner

DISTRICT COURT
- ☐ Conn. ☐ EDNY ☐ WDNY
- ☐ NDNY ☒ SDNY ☐ VT
- ☐ Other (specify) _____

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SCHEDULING ORDERS

	SO 1	Adj SO 2	Adj SO 3	Adj SO 4	Adj SO 5
	DATE ISSUED	DATE ISSUED	DATE ISSUED	DATE ISSUED	DATE ISSUED
	4-28-77	7-13-77			
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BRIEFS:					
Appellant	6-17-77				
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No.		R.B.			
Argument (Week of)	8-15-77	8-9-77 8-29-77			
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FILING OF BRIEF, APPENDIX, ETC.

PAPER FILED	PARTY	DATE
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Issuance of Mandate Stayed ☐ Stay Vacated ☐

CALENDAR

- Date Time Request Sent: 4-28-77
- Date Disqualification Sent: 7-5-77
- Date Certain Notices Sent (No. sent ___): 1 2 3 4 5 6
- Receipt of Day Certain Notices 1 2 3 4 5 6 ☐
- Date Set for Argument: 10-6-77
- Committed ☐
- Not Committed ☐
- ROR ☐
- Bail ☐

TERMINATION

- Date Heard/~~Submitted~~: 10-6-77
- Tape No.: 297
- Date Judgment Filed/~~Order or Disposition~~: 12-6-77
- Date Mandate Issued: 7-14-78
- Date Bill of Costs Filed: 12-16-77
- Date Statement of Costs Filed: 7-14-78
- Petition for Rehearing Filed Date ____ Granted ☐ Denied ☐ Date ____
- ☐ Additional Petitions for Rehearing-See Docket Entries
- Petition for Certiorari Filed Date ____ Granted ☐ Denied ☐ Date ____
- ☐ Additional Petitions for Certiorari-See Docket Entries

METHOD OF DISPOSITION

- ☒ WRITTEN OPINION (BY JUDGE)
- ☐ WRITTEN OPINION (PER CURIAM)
- ☐ DECISION FROM THE BENCH
- ☐ SUMMARY ORDER
- ☐ COURT ORDER W/O OPINION
- ☐ DEFAULT DISMISSAL (CAMP, CAEP, OTHER)
- ☐ CONSENT DISMISSAL (RULE 33, CRIMINAL, OTHER)
- ☐ 0.18(7) DISMISSAL
- ☐ OTHER (SPECIFY) _____

Record Returned: 2/14/79

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Table of Contents

	Pages
Preliminary Statement	1-4
Argument -	
Point I	
The pre-dispute arbitration agreement at bar is invalid because of the pervasive public interest in regulation of the commodities markets and investor protection therein.	4-12
Point II	
The arbitration agreement enforced by the Court below is unenforceable because it violates the rules and regulations promulgated by the Commodity Futures Trading Commission pertaining to such agreements.	13-24
Conclusion	24-25
Addendum A	

United States Court of Appeals
For the Second Circuit

----------X

Harold Ames, :

Plaintiff-Appellant, :

Docket No. 77-7192

-against- :

Merrill Lynch, Pierce, Fenner & Smith, Inc. and Christopher V. Streit, :

Defendants-Appellees. :

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Appellant's Brief

Preliminary Statement

This is an appeal from an order of the Honorable Charles S. Haight, Jr., United States District Court, Southern District of New York, dated March 18, 1977. The supporting opinion is not officially reported, but may be found at CCH, Commodity Futures Law Reporter, ¶20,283 (1977).

This action arises from violations by defendants-appellees of the anti-fraud provisions of the Commodity Exchange Act, 7 U.S.C. §2 et seq., as amended by the Commodity Futures Trading Commission Act of 1974 (hereinafter collectively the "Commodity Exchange Act") and the rules and regulations promulgated thereunder.

The complaint alleges that defendants-appellees, in violation of Sections 6(b) and 6(o) of the Commodity Exchange Act, 7 U.S.C. §§6(b) and 6(o), by use of the mails and instrumentalities of interstate commerce:

a) cheated and defrauded plaintiff-appellant;

b) willfully made and caused to be made to plaintiff-appellant false reports and statements in connection with orders and the making of contracts of sale of commodities in interstate commerce;

c) willfully deceived plaintiff-appellant with regard to such orders and contracts and the dispositions and executions of such orders and contracts;

d) employed a device, scheme or artifice to defraud plaintiff-appellant; and

e) engaged in transactions, practices and a course of business which operated as a fraud and deceit upon plaintiff-appellant.

The details of these charges are set forth in paragraphs 6 through 17 of the complaint (8a-11a).*

Defendants-appellees moved in the District Court to stay this action on the basis of a pre-dispute arbitration clause buried in the fine print of the Commodity Account Agreement (35a) which plaintiff-appellant was required to sign as a condition to the opening of his commodity account with defendant-appellee Merrill Lynch, Pierce, Fenner &

*The numbers in parenthesis refer to the pages in appellant's Appendix.

Smith, Inc. (hereinafter "Merrill Lynch").*

The District Court below stayed this action as against both defendants-appellees. In so doing, the Court disregarded the well established public policy against arbitration of claims such as that at bar as enunciated in Wilko v. Swan, 346 U.S. 427 (1953) and the subsequent determinations of this Court applying that policy to cases arising under the Securities Exchange Act, the anti-trust laws, the bankruptcy laws and other areas in which there is a pervasive public interest.

In addition, the District Court below overruled and disregarded a regulation promulgated by the Commodity Futures Trading Commission which expressly invalidated the pre-dispute arbitration clause at bar (48a) on the stated ground that plaintiff-appellant might "arguendo" have entered into the pre-dispute arbitration agreement voluntarily

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*During the course of the Commission's hearings on this proposed regulation, testimony was obtained that brokerage firms included these pre-dispute arbitration provisions in standard form customer agreements; that if a person objected to inclusion of that provision, the firm would insist on its retention; and that, if that person refused to sign an agreement including the pre-dispute arbitration clause, the firm would reject him as a customer. Most significantly, the testimony to this effect was given by a Mr. Steven Metz, Esq. representing the law department of defendant-appellee Merrill Lynch. Inasmuch as this Court, as well as the District Court, may take judicial notice of that public record [Rule 201(b)(2) and (d), Fed. Rules of Evidence], a copy of the transcript of Mr. Metz's testimony in this regard was annexed to appellant's brief to the District Court and a copy is annexed hereto as Addendum A.

and that therefore invalidation of the agreement would be unfair to defendant-appellee (47a, 49a).

The decision below should be reversed because the pre-dispute arbitration agreement at bar is invalid; there is a pervasive public interest in the regulation of the commodities futures markets pursuant to the Commodity Exchange Act and the investor protection afforded thereby.

In addition, the regulation promulgated by the Commodity Futures Trading Commission invalidating the pre-dispute arbitration clause at bar was valid and proper, especially in view of the public announcement by the Commodity Futures Trading Commission months before the agreement at bar was signed to the effect that the Commission regarded such agreements as invalid. The regulation invalidating such clauses did not retroactively deprive defendant-appellee Merrill Lynch of any vested right or expectation.

Argument

I

The pre-dispute arbitration agreement at bar is invalid because of the pervasive public interest in regulation of the commodities markets and investor protection therein.

The pre-dispute arbitration agreement in the case at bar is invalid because the provisions of the Commodity Exchange Act enacted for investor protection require judicial direction to fairly assure their effectiveness. Where, as in the case

at bar, the rights asserted arise under federal legislation designed for the protection of the public interest as well as investors for whose protection the legislation was enacted, such investors are entitled to adjudicate their rights in the courts. Wilko v. Swan, 346 U.S. 427 (1953); Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970); Maheu v. Reynolds & Co., 282 F.Supp. 423 (SDNY 1967); Stockwell v. Reynolds & Co., 252 F.Supp. 215 (SDNY 1965); Reader v. Hirsch & Co., 197 F.Supp. 111 (SDNY 1961). See, also, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968); Allegaert v. Perot, 548 F.2d 432, 436 (2d Cir. 1977); Milani v. Conti Commodity Services, Inc., n.o.r. CCH Commodity Futures Law Reporter, ¶20,227 (N.D.Cal., Nov. 1976).

Wilko v. Swan, supra, was an action alleging violations of the Securities Act of 1933. Defendant moved to stay the action on the ground that plaintiff had signed a customers agreement similar to the one at bar incorporating a provision requiring that plaintiff submit any dispute arising from his account to arbitration. The Supreme Court invalidated the arbitration agreement. It held that the agreement weakened the ability of the plaintiff to recover under the Securities Act. The Court pointed out that arbitration lacks the certainty of a suit at law and that when a securities customer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The Court pointed out that the provisions

of the Securities Act were designed for investor protection and that their effectiveness in application would be lessened in arbitration as compared to judicial proceedings. The Court noted that a securities fraud case requires objective findings on the purpose and knowledge of an alleged violator of the Act and that the provisions of the Securities Act should not be interpreted and applied by arbitrators who may be without judicial instruction on the law. The Court further noted that inasmuch as an arbitration award may be made without explanation of the reasons therefor and without a complete record of the proceedings, the arbitrators' conception of the legal meaning of statutory requirements could not be examined by a court. The Court held that the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness.

Relying upon the rationale of Wilko v. Swan, supra, pre-dispute arbitration clauses have been consistently invalidated with respect to claims arising under the Securities and Exchange Act of 1934. Greater Continental Corp. v. Schechter, supra; Maheu v. Reynolds & Co., supra; Stockwell v. Reynolds & Co., supra; Reader v. Hirsch & Co., supra.

In Greater Continental Corp. v. Schechter, supra, this Court noted the "strong federal policy in favor of

determining stock fraud questions in the federal courts" and observed:

> "This type of question concerning fraud within the meaning of Rule 10b-5 is properly litigated in the court where a complete record is kept of the proceedings and findings and conclusions are made. It was for that reason that in both the 1933 and 1934 Securities Acts Congress provided that questions arising under those Acts were not to be determined in arbitration proceedings (but rather in the courts) even if the contract between the parties contained an arbitration provision." (422 F.2d 1103)

While the cases invalidating pre-dispute arbitration clauses as applied to claims under the Securities Act of 1933 and the Securities and Exchange Act of 1934 make reference to provisions in those statutes invalidating any stipulation waiving compliance with those Acts, the public policy underlying Wilko v. Swan, supra, is broader and has been extended to other situations involving federal statutory rights where the statutes involved contain no such anti-waiver provisions. Thus, in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Supreme Court held that the right to a trial under the Civil Rights Act of 1964 could not be waived by the arbitration provisions in a collective bargaining agreement. Similarly, in American Safety Equipment Corp. v. J.P. McGuire & Co., 391 F.2d 821 (2d Cir. 1968), this Court, citing Wilko v. Swan, supra, and the pervasive public interest in enforcement of the anti-trust laws, invalidated a pre-dispute arbitration clause as applied to anti-trust claims. See, also, Power

Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970). Similarly, bankruptcy issues ordinarily are not arbitrable [See Allegaert v. Perot, 545 F.2d 432, 436 (2d Cir. 1977)].

The legislative history of the Commodity Futures Trading Act of 1974 and the Commodity Exchange Act of 1936 makes clear the intent of Congress to apply to dealings in commodity futures the same pervasive public interest and the same type of regulation and investor protection which is afforded under the Securities Act of 1933 and the Securities and Exchange Act of 1934.

Thus, in Senate Report No. 93-1131, reported in United States Code Congressional and Administrative News respecting the 93rd Congress, Second Session 1974, at pages 5843 et seq., the Committee reviewed the history of regulation of the commodities markets and noted that under the Commodity Exchange Act of 1936 (which added Section 6(b) referred to in paragraph 5 of the complaint) broad authority was granted to extend regulation to the previously uncovered field of commodity brokerage in order to suppress cheating, fraud and fictions transactions in futures. Op. Cit., p. 5855. The Senate Report went on to point out that a fundamental purpose of the Commodity Exchange Act was to insure fair practice and honest dealings on the commodity exchanges. Op. Cit., p. 5856. The introductory portion of the Senate Report

concludes that the importance of futures trading to the general public and to the nation equals the importance of the securities markets and that the time had come to establish a regulatory authority in the commodity field similar to the Securities and Exchange Commission. Op. Cit., p. 5860.

In the debates on proposals to amend the Commodity Exchange Act, Senator Murray emphasized the great public interest in the commodities futures markets, stating his view that the need for investor protection in those markets was even greater than in the securities markets:

> "... The bill seeks to minimize cheating or fraudulent practices ... . Similar irregular practices in the securities exchanges of the country have been ruled out by the provisions of the Securities Exchange Act. There is much greater reason for ruling out these underhanded practices in the commodities exchanges." (74 Cong. Rec. 7857-60 (1936))

The 1974 Senate Committee recognized the important role of the courts in the regulatory scheme pertaining to commodity futures trading and specifically pointed out:

> "The committee also wished to make clear that nothing in the Act should be construed as superseding or limiting jurisdiction of federal and state courts." (Op. Cit., p. 5863)

Accordingly, §2 of the Commodity Exchange Act, 7 U.S.C. §2, was amended by adding to its provision conferring exclusive jurisdiction upon the Commodity Futures Trading Commission the following:

> "Nothing in this section shall supersede or limit the jurisdiction conferred on the United States or any State."

In Milani v. Conti Commodity Services, Inc., n.o.r. CCH Commodity Futures Law Reporter, ¶20,227 (N.D. Cal., Nov. 1976)*, the District Court held a pre-dispute arbitration clause similar to that at bar to be invalid, extending the rationale of the authorities cited above to cases involving alleged violations of the Commodity Exchange Act. In so doing, District Judge Weigel aptly stated:

> "In Wilko v. Swan, supra at 431, the Supreme Court recognized that the 'United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation.' Nevertheless, the Court carved out an exception, holding that an agreement to arbitrate future disputes was not enforceable as to issues arising under the Securities Act. A further exception, barring agreements to arbitrate future disputes, has been created for claims under the antitrust laws. [citations omitted] The Wilko holding has been extended to claims under the Securities Exchange Act. [citations omitted] See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974), deciding that the right to a trial conferred by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (Supp. V 1975), cannot be prospectively waived in a collective bargaining agreement.
>
> These exceptions, as can be seen from the nature of the subject matter, were created to protect the integrity of the marketplace.

*Arkoosh v. Dean Witter & Co., n.o.r. CCH Commodity Futures Law Reporter, ¶20,170 (D.Neb. 1976), relied upon by the Court below, involved common law claims only - not claims of violations of the Commodity Exchange Act as alleged in the case at bar.

> The Wilko Court made clear that the protection of investors by federal courts controls over the policy favoring arbitration. 346 U.S. at 438. Judicial direction, at the trial level, is essential to assure that legislation designed to protect investors is properly applied. Id. at 436-37. Like the securities acts, the CEA is clearly designed to protect the investing public [citations omitted]."
>
> ***
>
> "... Where, as here, a claim of violation of the [sic Commodities Exchange] Act is sufficiently raised, the action should be decided by the court, not by arbitrators."

The case at bar, like Wilko v. Swan, supra, Greater Continental Corp. v. Schechter, supra, and American Safety Equipment Corp. v. J.P. McGuire & Co., supra, presents issues in an area of law pervaded by public interest. The regulation of commodities futures trading, like that of the securities markets and the commerce which is protected by the anti-trust laws, is a matter which has a public impact beyond the rights of the litigants at bar. Furthermore, in the case at bar, as in the securities fraud cases cited above, investor protection requires judicial direction to fairly assure its effectiveness. The rights asserted by plaintiff-appellant were created by federal statutes for the protection of investors whose bargaining position is not equal to that of brokers such as defendant-appellee Merrill Lynch.

Here, as in the cases cited above, vindication of the rights of plaintiff-appellant requires an objective trial and findings of fact and conclusions of law made by or under the direction of a court equipped to interpret and apply the law. Without a complete record of the proceedings including a judgment setting forth the basis and reasons therefor, appellate review of the arbitration award would be impossible. Accordingly, here, as in the cases cited above, the pre-dispute arbitration agreement should be invalidated and plaintiff-appellant should have his opportunity to have his claims adjudicated in the District Court.

II

The arbitration agreement enforced by the Court below is unenforceable because it violates the rules and regulations promulgated by the Commodity Futures Trading Commission pertaining to such agreements.

The Commodity Exchange Act, as amended by the Commodity Futures Trading Commission Act of 1974 ("the Commodities Act"), establishes a statutory framework governing, inter alia, the sale of commodity futures contracts. In 1975, Congress established the Commodity Futures Trading Commission (hereinafter the "Commission") as an independent regulatory agency of the United States government, charged with the exclusive responsibility for administering and enforcing the provisions of the Commodities Act [Commodities Act, 7 U.S.C. §§2 and 4(a)(Supp. IV, 1974)]. Section 8a(5) of the Commodities Act, 7 U.S.C. §12a(5)(Supp. IV, 1974) broadly authorized the Commission to:

> "make and promulgate such rules and regulations as in the judgment of the Commission are reasonably necessary to effectuate any of the provisions or accomplish any of the purposes of this Act."

Soon after the establishment of the Commission, on July 10, 1975, the Commission issued an interpretive ruling with respect to the legality and enforceability of arbitration agreements in light of Section 5a(11) of the Commodity Exchange

Act.* The interpretive ruling was in response to a question whether Section 5a(11) of the Commodity Exchange Act precludes arbitration or other procedures for the resolution of customer claims involving amounts over $15,000.

In its interpretive response published at 40 Fed. Reg. 29121 (July 10, 1975), the Commission made clear its interpretation that arbitration of claims in excess of $15,000 was not prohibited by the Commodity Exchange Act provided that such procedure was "voluntarily entered into by the customer after the time the claim arose" (emphasis added). The Commission thus as early as July 10, 1975, more than four months prior to the execution of the arbitration agreement at bar, made clear its interpretation that the law relating to arbitration agreements of disputes arising under the Commodity Exchange Act was the same as the law applicable to arbitration of disputes arising under the Securities Act of 1933 and the Securities and Exchange Act of 1934. See, Coenen v. R. W. Pressprich & Co., 453 F.2d 1209 (2nd Cir. 1972; Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 342 (3d Cir. 1968); Korn v. Franchard Corporation, 388 F.Supp. 1326, 1329 (SDNY 1975).

Thereafter, on August 14, 1975, the Commission published

*Section 5a(11) requires contract markets to establish a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims provided that the use of such procedure by a customer shall be voluntary and shall not be applicable to a claim in excess of $15,000.

in the Federal Register for public comment proposed rules which set forth affirmative requirements to be met in establishing arbitration or other dispute settlement procedures. 40 Fed. Reg. 34152. Those proposed rules included Section 200.5 covering a procedure for settlement of customers' claims and grievances which are not covered by Section 5a(11) of the Commodity Exchange Act. Section 200.5 envisioned the submission of a claim or grievance to arbitration only after the dispute had arisen and required that the customer be warned in writing in advance of the submission of the claim or grievance that all formal legal safeguards provided in a court of law might not be available to him. The rule provided that only if after receipt of such warning the customer voluntarily agreed to submit the claim or grievance could the arbitration go forward.

After considering comments and suggestions received with respect to the proposed rules and prior interpretive statement, the Commission on November 24, 1975 announced its determination to amend its proposed rules. 40 Fed. Reg. 54430. The announcement of the amended proposed rules invited interested persons to participate in the rule-making process by providing written submissions to the Commission. The Commission also decided to hold a public hearing for the purpose of receiving additional comments written or oral from interested persons, and notice of this hearing was published in the Federal Register

on February 11, 1976, 41 Fed. Reg. 6120.

The hearing was held on March 5, 1976, and on July 2, 1976 the Commission issued for further comment further amendments to its proposed regulations (41 Fed. Reg. 27520). At the same time, the Commission issued Regulation §180.3 which for the first time intimated that the Commission might regard as valid any type of pre-dispute arbitration agreements. Proposed Regulation 180.3 continued the prohibition of any such pre-dispute arbitration agreement, but announced that such agreements might in the future be valid provided they were voluntary (not required as a condition of doing business) and met certain prescribed conditions, including the printing of a warning in bold face type concerning the effect of waiving the right to trial in court. Interested persons were given until July 26, 1976 to submit written comments on the proposed rule. After considering all the comments, the Commission adopted Regulation §180.3 with minor modifications from the form which was proposed on June 25, 1976 and published in the Federal Register on July 2, 1976. 41 Fed. Reg. 42942, 42943 (Sept. 29, 1976). Regulation §180.3 permits pre-dispute arbitration agreements only if:

1) signing the agreement is not made a condition for the customer to use the services of the broker;

2) if the agreement is separate from any other agreement, or if contained in an agreement with other

provisions, contains a provision for separate endorsement of the arbitration clause;

3) the agreement does not require the customer to waive his right to reparation procedures under the Act; and

4) if the agreement contains in bold face type specified cautionary language.

In adopting Regulation §180.3, the Commission stated its opinion that a court would not uphold a currently extant pre-dispute arbitration agreement by reason of the rule of public policy enunciated by the Supreme Court in Wilko v. Swan, 346 U.S. 427 (1953). See, 41 Fed. Reg. 42942 at p. 42944.

The Commission further stated that Regulation §180.3(b) was not intended to eliminate the role of the courts in assuring that the execution of arbitration agreements was voluntary (41 Fed. Reg. at p. 42945).

In announcing Regulation §180.3, the Commission stated its findings as a result of the hearings held by it with respect to the proposed regulations, including its findings that existing pre-dispute arbitration agreements were not voluntary since the Commission had taken testimony of futures commission merchants who stated they would not deal with customers who were unwilling to sign pre-dispute arbitration agreements, that there was a pattern of systematic refusals by futures commission merchants to deal except in circumstances which eliminated basic rights of customers and that certain commodity

customers who are unsophisticated were being compelled to sign such agreements under conditions which suggested a lack of informed consent and the imposition of a contract on them to their detriment (41 Fed. Reg. at p. 42945).

In announcing Regulation §180.3, the Commission reported that during its oral hearings on March 5, 1976 several futures commission merchants testified they would refuse to deal with persons who declined to sign binding arbitration agreements contained in customer account agreement forms. The Commission indicated that it believed that this practice might be followed by a substantial segment of the entire industry and effectively precluded a voluntary act by the customers since they were frozen out of the market unless they signed pre-dispute arbitration forms. (41 Fed. Reg. 42945). Parenthetically, one of the witnesses referred to was Mr. Steven Metz, Esq. representing the law department of defendant-appellee Merrill Lynch (see, Addendum A annexed hereto).

The Court below readily acknowledged that the pre-dispute arbitration agreement before this Court does not comply with §180.3 (48a) and that the Commodity Futures Trading Commission had determined that all pre-dispute arbitration agreements that do not satisfy the conditions set forth in Regulation §180.3, including those theretofore signed by customers, were null and void (46a).

The Court erroneously, however, determined that inasmuch as the arbitration agreement might have been entered into voluntarily, application of Regulation §180.3 would retroactively deprive defendants-appellees of their right to arbitrate and would therefore be unfair (47a, 49a). The Court reasoned that the Commission was not interpreting the Commodity Exchange Act or providing retroactive clarification, but was engaged in retroactive legislation. In so ruling, the Court erred in several respects.

First of all, as pointed out above, the effect of Regulation §180.3 is not to invalidate formerly valid pre-dispute arbitration clauses, but rather to state conditions under which pre-dispute arbitration clauses, not formerly valid, could be validly utilized.

Secondly, even if this Court were to disagree with respect to the applicability of the doctrine of Wilko v. Swan to claims arising under the Commodity Exchange Act, the Commission, prior to the execution of the agreement at bar, put defendants-appellees as well as other commodity futures brokers on notice that it considered such pre-dispute arbitration agreements invalid under the Commodity Exchange Act as amended in 1974 and 1975. Such notice was adequately given by its interpretive ruling on July 10, 1975, 40 Fed. Reg. 29121, as well as in its proposed rules of August 14, 1975, 40 Fed. Reg. 34152. Accordingly, defendants-appellees presented the predispute arbitration agreement to plaintiff-appellant with

notice that the Commission deemed it invalid and can hardly be heard to claim that they have been prejudiced when the Commission later confirmed its view that such agreements were invalid within the meaning of the Commodity Exchange Act.

It is also difficult to perceive how the Court below could deem the effect of retroactive application of Regulation §180.3 as unjust or unfair to defendants-appellees in the light of the evidence presented to the Commission that such agreements were not voluntary insofar as defendant-appellee Merrill Lynch was concerned, but were required as a condition to utilization of its services.

As conceded by the Court below (47a), if Regulation §180.3 is considered to be merely interpretive, it does not matter whether it is retroactive or prospective. Contrary to the opinion below (47a-49a), Regulation §180.3 does not change settled law. To the extent that applicable law was "settled", it barred pre-dispute arbitration agreements (see, Point I, supra). To the extent that the law was unsettled, it was unsettled as to whether Wilko v. Swan, supra, extended to cases under the Commodity Exchange Act, and, if not, whether a pre-dispute arbitration agreement could be "voluntary" within the meaning of that Act. There was ample basis for the Commission to determine as a matter of interpretation that no pre-dispute arbitration agreement such as that at bar could be considered to be voluntary unless the safeguards required by Regulation §180.3 had been followed.

If Regulation §180 is deemed to be legislative, it nevertheless was valid because making it retroactive was justified by the evidence upon which the Commission acted and the authority accorded to the Commission by Congress. As stated by the Supreme Court in SEC v. Chenery Corp., 332 U.S. 194 (1947), the Court's "duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress" (332 U.S. 194 at 207). In Chenery, supra, the Supreme Court further held that courts were free to disturb the Commission's conclusion "only if it lacks any rational and statutory foundation" (332 U.S. 194 at 207). See, also, Montana Power Company v. Federal Power Commission, 445 F.2d 739 (D.C.Cir. 1968), cert. den. 400 U.S. 1013 (1971), in which the Court held that retroactive elimination of the right to arbitrate did not constitute deprivation of a substantial or vested right.

In view of the foregoing recital of the history of Regulation §180.3, including the testimony taken by the Commission from defendant-appellee Merrill Lynch, as well as the interpretive opinions consistently issued by the Commission prior to the execution of the arbitration agreement at bar, the promulgation of Regulation §180.3 and its application to the agreement at bar was clearly based upon substantial evidence and was clearly consistent with the authority granted

by Congress (see the opinion of the District Court, 45a-46a).

This Court has sanctioned the application of an administrative rule newly-fashioned to past conduct. In NLRB v. Pease Oil Co., 279 F.2d 135 (2d Cir. 1960), this Court upheld an administrative determination that brought within the agency's jurisdiction an employer previously left without (279 F.2d 135, 137-139). Similarly, in NLRB v. A.P.W. Products Co., this Court upheld imposition by an administrative agency of a more severe remedy for conduct already prohibited (316 F.2d 899 (2d Cir. 1963).

In Leedom v. International Brotherhood of Electrical Workers, Local 108, 278 F.2d 237 (D.C.Cir. 1960), the Court of Appeals for the District of Columbia affirmed a new regulation shortening the period in which a collective bargaining agreement might bar a new election. In Leedom, the Board argued that to apply the contract bar only in futuro would, in some cases, preclude the Board from putting its new policies into effect for as long as five years from the date the change was announced. In addition, the simultaneous administration of the new and old rules would create an "administrative monstrosity". Judge Bazelon writing for the Court agreed, stating:

> "Here in the nature of the problem the Board could not promulgate these rules prospectively without having to wait up to five years to put its new policies into full effect. This drag on the administrative process would tend to destroy its flexibility."

Similarly, in the case at bar, prospective application of Regulation §180.3 would leave in effect many pre-dispute arbitration agreements, delaying by years the ability of the Commission to insure that only voluntary arbitrations are used to resolve cases arising under the Commodity Exchange Act.

Retail Wholesale and Department Store Union AFL-CIO v. National Labor Relations Board, 466 F.2d 380 (D.C.Cir 1972), relied upon by the Court below, mandates a decision for appellant, not appellees. The concept of invalidating pre-dispute arbitration agreements as applied to issues in which the public has an interest and claims seeking to enforce federal statutes enacted for investor protection presented a case of first impression in its application to the new regulatory scheme for commodities futures. The rule enunciated by the Commission first in its interpretive ruling and later in the Regulation is hardly a departure from well-established practice, but rather merely extends that practice to an area where the law had not been litigated. In the case at bar, Merrill Lynch, in light of the Commission's interpretive ruling and proposed regulations, had no right to rely upon the validity of the arbitration agreement and cannot claim that the promulgation of the Regulation and its application to the case at bar in any way have cast an unanticipated burden upon it.

Similarly, Green v. The United States, 376 U.S. 149 (1964), cited by the Court below, is not applicable to the case at bar. In view of the broad application of the doctrine of

Wilko v. Swan, supra, in areas in which defendants-appellees were engaged and familiar, and in view of the interpretive rulings and proposed regulations promulgated by the Commodity Futures Trading Commission, the final Regulation cannot be said to have interfered with any antecedent rights or legitimate expectations of defendants-appellees.

The Court below erred in its refusal to apply Regulation §180.3 to the case at bar.

Conclusion

The pre-dispute arbitration clause upon the basis of which the Court below stayed this action is invalid. There is a pervasive public interest in the regulation of the commodities futures markets pursuant to the statute under which appellant sues herein. That statute was enacted for the protection of appellant and other investors, and appellant is entitled to a judicial resolution of his claims.

The Court below erred in disregarding the regulation promulgated by the Commodity Futures Trading Commission which on its face invalidates the pre-dispute arbitration agreement at bar. Regulation §180.3 is interpretive. It defines the meaning of the term "voluntary" as used in the Commodity Futures Exchange Act and extends to commodities fraud cases under the Act policies enunciated in the case of Wilko v. Swan, supra, which have been

applicable to securities fraud cases under the Securities Act of 1933 and the Securities and Exchange Act of 1934. Clearly, there was no settled law validating pre-dispute arbitration agreements as applied to commodities fraud cases.

Even if Regulation §180.3 were regarded as legislative, it was a valid exercise by the Commodity Futures Trading Commission of authority granted to it by Congress upon the basis of evidence taken at hearings in which appellee Merrill Lynch participated. Furthermore, the intention to promulgate a bar on pre-dispute arbitration clauses was enunciated by the Commission months prior to the execution of the margin agreement in which the arbitration clause at bar is contained. Regulation §180.3 deprives appellees of no vested right or legitimate expectation.

The order below should be reversed and appellant should be enabled to pursue this action expeditiously.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

as drawn would prohibit a strong arbitration panel.

Thank you.

CHAIRMAN SCHNEIDER: Thank you very much, Steve. Commissioner Dunn?

COMMISSIONER DUNN: No questions.

CHAIRMAN SCHNEIDER: Commissioner Seevers?

COMMISSIONER SEEVERS: No questions.

CHAIRMAN SCHNEIDER: Steve, if I may, a couple of questions. One question that we asked Mr. Goldstein that was on the necessity for experts on panels.

Do you feel that only members or employees of contract markets are experienced and that that experience is necessary to an arbitration panel?

MR. METZ: I don't claim that they're the only ones with experience. I think you can look, as Mr. Goldstein suggested, not sarcastically as he said, that you take everyone who has lost money in the area, but I think there are sophisticated professionals who are commodity traders who are not members of an Exchange and they could be a sophisticated panel.

We welcome the right to a mixed panel. We think it would be fair to bring other people of the community into the hearing of a case, whether it be an attorney --

CHAIRMAN SCHNEIDER: How mixed? What proportions?

MR. METZ: I find that the New York Stock Exchange

right now runs at two securities people versus three outsiders. I think a 40 percent mixture would be fair.

CHAIRMAN SCHNEIDER: In other words, you're saying that a majority of the panel as being non-commodity related would be a fair panel?

MR. METZ: I think that there may be rules where the customer may require or may want more than that percentage. In theory, there may be a floor broker and it may be a very complicated case, an average businessman, an average attorney would never understand the complexity of a problem and may want more of a sophisticated panel.

CHAIRMAN SCHNEIDER: Should the Commission mandate a mixed panel which has a majority of non-industry people?

MR. METZ: I have no objection to that.

CHAIRMAN SCHNEIDER: Steve, could we go to the question of voluntary? And one of the things that you said is that your reading of the Act and the rules that we promulgated, that the voluntary is voluntary both for the members and the customer.

I mean, for example, could a contract market provide that all members of the contract market shall enter into arbitration when the customer has selected it?

MR. METZ: I think they do already.

CHAIRMAN SCHNEIDER: Do you see anything wrong with that procedure?

MR. METZ: No, I don't.

COMMISSIONER SEEVERS: Howard, I'll ask my previous question on the meaning of voluntary.

CHAIRMAN SCHNEIDER: Yes.

COMMISSIONER SEEVERS: If a customer wants to get into commodities and made some study of the subject, he comes to a brokerage firm and is required to sign a waiver stating that he will enter a compulsory arbitration; otherwise the firm will not take the customer's business.

Is that really voluntary?

MR. METZ: I think you're dealing with the word and the aspect of when he goes -- enters the commodities market, that's voluntary.

I think that most customers understand that they may be forced into arbitration or compulsory arbitration. I think it is voluntary because he is understanding or she is understanding that if a dispute arises there is language in our agreement that would provide such an event so I think it is voluntary in the sense that the person is signing that and understands that if there is dispute they may be forced.

It's not compulsory in this sense, Commissioner, that the broker may not want to go into arbitration. As I tried to explain before, the customer may be the one that wants to go into arbitration so it's not compulsory.

Things would have to happen to force the customer

in but if the customer first went to court, it would then be up to the broker to compel that customer into arbitration.

If they so desire they may want to stay in court. So it's not compulsory to that degree but I do think it's voluntary at that time he or she is signing something and understands what they are signing.

CHAIRMAN SCHNEIDER: Okay. Mr. Russo, I think, has some additional questions on the issue of voluntary. We'd like to pursue that.

MR. RUSSO: I'd like to go through what actually happens if a customer, for example, decides that he doesn't want to sign the customer's agreement or let's take a concrete example.

A customer says "I will sign it but I don't want that particular clause." Now, Mr. Crawford testified that they might well not accept that particular customer.

What is Merrill Lynch's policy in this area?

MR. METZ: We might not accept the customer either. We may or may not. I think it would depend on circumstances and facts. I couldn't give you a definite answer but I would say this that it's a possibility that we might not accept the customer.

CHAIRMAN SCHNEIDER: Just on the basis of his not agreeing to arbitration?

MR. METZ: Well, in a sense that if this is what

the company bulletin says and the policy says, that this is what he should sign and he wants to waive that, I think that would be question that we would have to review.

I can't give you a yes or no definite but I would say that there's a possibility that we would not accept him.

MR. RUSSO: Steve, would you weigh in your decision on that, the particular account? Let's say, for example, a major institution who says "I'd like the customer's agreement but I'd like to x out this particular clause."

MR. METZ: I think, Tom --

MR. RUSSO: In other words, I'm trying to see what are the kinds of things.

MR. METZ: I think a customer of that magnitude if you're talking about an institution, probably would want to go into arbitration, feeling it's the best way to go and they probably would not be the individual that would object to that type of agreement.

I'd have to agree with what Don stated before. It's usually the attorney customer who is the one who is reading something and is the one that's complaining.

MR. RUSSO: Steve, I had an actual case when I was in private practice of something similar to this in representing a major client.

CHAIRMAN SCHNEIDER: All those years ago.

MR. RUSSO: All those years ago, and that was

something that we did discuss. So it's not unusual and let's say we're assuming, for argument sake though, that a major institution says "I want to open up an account with Merrill Lynch but what I'd like to do is x out this particular arbitration clause."

What do you think would happen?

MR. METZ: I would say that the customer, more than likely, would be turned down.

MR. RUSSO: Are you saying that the size of the institution is not --

MR. METZ: No, I'm not saying that. I'm saying that it depends on various factors. If the broker, the account executive comes in to New York and says "This fellow wants to x out part of the agreement" we will say "No, he cannot do that."

I mean, somewhere along the line, maybe an account executive will x it out and agrees with the customer but I'm saying if they come to New York and ask the policy ruling, we will tell them that the customer will have to sign the agreement as drawn.

MR. RUSSO: Okay.

MR. METZ: Do you understand what I'm saying? Somewhere along the line --

MR. RUSSO: Obviously you see what I'm trying to get at. I'm trying to see how much negotiation there is

involved in the size of the business.

MR. METZ: It has nothing to do with the size. I'm saying at least out of New York. I'm sure that if you went to every office you might find an arbitration agreement and you could say "That's a large customer."

CHAIRMAN SCHNEIDER: Steve, if a large customer came to Merrill and was going to provide something like $2 million in commissions a year, are you saying that Merrill would not negotiate the x'ing out of an arbitration agreement with that customer?

MR. METZ: I'm not saying that.

CHAIRMAN SCHNEIDER: I didn't assume that that was the case and I think that's what Tom Russo's saying.

MR. METZ: I think that you could go the other way. I think that you can also go to -- and if it's a small customer, I don't mean small in that sense, but I don't mean an institution, a well-known individual in the community who may want it out for various reasons and that may be negotiated at his local level.

I'm saying that the general policy rule, the agreement as drawn, is what we expect to have signed.

CHAIRMAN SCHNEIDER: Merrill goes by the book.

MR. METZ: We try to.

CHAIRMAN SCHNEIDER: Right.

MR. RUSSO: Let me proceed with a few other

questions that we went through with Mr. Crawford.

Let's assume that the customer does sign the arbitration agreement and dispute arises and let's take the same example we took before, it's a $10,000 dispute against Merrill Lynch and let's just assume that there's no counterclaims to complicate it.

The customer then wants to go to reparations at that particular point in time. What is Merrill Lynch's policy then?

MR. METZ: It has not yet happened, Tom. I don't want to sound like I'm avoiding the answer. We have not discussed it. That's the best I can give you.

MR. RUSSO: Okay. Do you think Merrill Lynch - and again I'm just asking you to think out loud and I realize you're not now speaking as policy for Merrill Lynch - do you think Merrill Lynch would try to get the case arbitrated?

MR. METZ: I don't know.

MR. RUSSO: But it's a possibility?

MR. METZ: It's a possibility. They could go either way. I just don't know the answer. I'm trying to be as honest with you as I can.

MR. RUSSO: Okay.

CHAIRMAN SCHNEIDER: I'd like to pursue a few other questions that we asked Mr. Crawford.

Do you feel that Merrill has a fiduciary obligation

to its customers when a customer walks in the door?

MR. METZ: Oh, I think fiduciary is the wrong word. I think we have an obligation to sit down and talk to him if he shows interest in opening an account or would like to discuss something.

So I think to that degree, we have a duty. Fiduciary, I think, is the wrong word.

CHAIRMAN SCHNEIDER: Do you think that Merrill has an obligation to the customer to inform, or in Mr. Goldstein's words, warn the customer?

MR. METZ: We do.

CHAIRMAN SCHNEIDER: That by signing the agreement he may be giving up a right to go to court?

MR. METZ: I don't know if that's mentioned in the discussion but what Mr. Goldstein was suggesting before that warnings are not given to our new customers about how volatile the commodity market is, that is done.

I would doubt that the arbitration thing is discussed in the sense of this is an agreement. By signing this you are waiving your right to court.

As I said to Mr. Seevers, it's not a waiver of the right to go to court. It's a matter of something that we would have to enforce.

CHAIRMAN SCHNEIDER: I don't understand that.

MR. METZ: Well, what I said to Commissioner

Seevers was that when a person signs an arbitration agreement, that does not mean automatically if a claim arises, that that customer will go into arbitration.

If he institutes suit in court, for various reasons, things may stay in court. So it's not a compulsory arbitration to the degree that every time there's litigation he's going to go to into arbitration.

CHAIRMAN SCHNEIDER: Just to pursue this line of questioning as we did with Mr. Crawford also, would you estimate that many customers of Merrill Lynch request that arbitration agreements be deleted?

MR. METZ: Probably not.

CHAIRMAN SCHNEIDER: Any kind of a ballpark figure?

MR. METZ: I have no idea at all.

CHAIRMAN SCHNEIDER: Do you want to pursue that?

MR. RUSSO: I just wanted to know as to what customers do? How many on a yearly basis, of your disputes, go to arbitration? What numbers are we talking about?

MR. METZ: We've been fairly fortunate in the commodity area; we haven't had too many. I'm just trying to hazard a guess. To arbitration on commodities, just commodities?

MR. RUSSO: Are you talking about 10, 50, 100?

MR. METZ: Twenty.

CHAIRMAN SCHNEIDER: Volume of commodity accounts,

approximately?

MR. METZ: I have no idea. All I know is that our advertising says we're the largest. If Mr. Crawford said 30,000 I assume it's more.

(Laughter.)

CHAIRMAN SCHNEIDER: Merrill always says that.

MR. RUSSO: They're bullish.

CHAIRMAN SCHNEIDER: Let's see if I can pursue one other area with you. I was curious about your reliance on Section 4 of the Federal Arbitration Act and what that implies.

As you read the provisions of the Federal Arbitration Act, do you view that as a legal mandate on the part of Congress to have arbitration agreements in effect and that their sanctity, therefore, cannot be broken in any way or whatever?

MR. METZ: I think the Federal Arbitration Act was originally written more as a procedural matter to provide the courts with a -- not to look as to how to accept arbitration and what to do with arbitration requests and so on.

I think what the Prima Paints case in 1967, that's now become -- the language of that case seems to indicate that the Federal Arbitration Act is now more or less a vehicle to go into arbitration and use arbitration rather than before.

One, it's just a procedure. It's not been taken by the courts, at least, to be more of a real method of going into litigation rather than just a procedural way to explain to the courts how to accept an arbitration agreement.

CHAIRMAN SCHNEIDER: What would be your view, your legal judgment, and I realize it's difficult giving out legal judgment, but what would be your judgment when putting the Commodity Exchange Act which has been passed with these extensive amendments of 1974 in the context of Section of 5 a (11) on the one end, and the various sections, Section 8 a which permit the Commission to do certain things to contract market rules and Section 14, the reparations provision.

Put those, for argument's sake here, I will call them remedial sections of the Act, in the context of or lay it side by side with the Federal Arbitration Act, Section 4 introduction and interpretation of it, do you think that the Federal Arbitration Act precludes this Commission from considering the question of whether those remedial sections have greater weight or more importance?

MR. METZ: That's a real loaded question. I would say that --

CHAIRMAN SCHNEIDER: I only ask loaded questions.

MR. METZ: Okay. It's really something for the courts to decide but to hazard a guess -- let me just back up.

One thing, if the Commodity Futures Trading Commission Act had been specific and said "arbitrations shall be voluntary after the transaction occurs" which is your language and your interpretation of what voluntary says, or it said something that "arbitration agreements would be null and void" or something to that effect, I would state that the Commodity Futures Trading Commission Act would have it made over the Federal Arbitration Act because as we learned in law school, a specific statute overrules the general statute.

But there is no language to that effect. It's just your interpretation, the Commission's interpretation of what the phrase voluntary means.

CHAIRMAN SCHNEIDER: Well, Steve, just to pursue that. I think that there has been, on the part of the testimony that both Mr. Crawford and you have given, great reliance on 5 a (11) as to which I think there should be, I mean, the phraseology of the word "voluntary, but I think you are aware that the Commission, in its rule, indicated that that was not the only basis on which it indicated that it was moving forward in this area and I think that there are several sections.

I mean when you look at 5 a (11) and you look at Section 14 of the Act, the reparations provision, I'm hard-pressed to understand, and I was hard-pressed to understand

how in Don Crawford's testimony, how you can square a statement that arbitration shall be voluntary and that reparations shall go forward with a contractual agreement which in effect mandates the arbitration, which the FCM community is highly in favor of and tries to move forward in all respects.

It seems to me that the situation, particularly with respect to reparations, where you have a voluntary -- where you have a compulsory arbitration agreement entered into or without using phraseology about it, where at the time the customer comes in, he signs an arbitration agreement which binds him to arbitration at some future day, how he understands that he has given up some rights with respect to that; how he makes intelligent choices at that point in time, is frankly beyond me, and how, particularly, he could ever go to reparations.

It seems to me that if the FCM community is prepared to move all these arbitrations forward and every single customer who comes in signs such an agreement, then it seems to me every single customer is then precluded from reparations and then what does Congress mean by the reparations section?

I mean, what is the purpose of the reparations section? How can it ever be put into effect?

MR. RUSSO: And, Steve, this is particularly a forceful argument in light of the testimony, that at least

two of the major firms of the industry might reject people. So, therefore, someone has a valid question and I think this is Gary Seevers' main question, what do we mean by voluntary?

MR. METZ: Well, when does voluntary occur? Just to mention briefly about what Howard said. The question could go the other way. I'm not trying to split hairs with you but if Congress had wanted to do away with arbitration, Exchange arbitration, I think they would have gone ahead and said so.

They apparently did not and so that's why you have this hearing, I guess, to determine --

CHAIRMAN SCHNEIDER: But the question, Steve, which is not being addressed, is the question of how reparations proceedings could ever have any efficacy if the FCM community has these agreements in effect which negate the prospect of going to reparation?.

I mean, what was Congress talking about? Unless you come to a conclusion, as the Commission had come to a conclusion prior to this hearing, that the agreements were agreements that should be voluntary at the time the claim arises, not at the time that you walk in the door; that there might be contracts of adhesion as to certain portions of the people who come in the door, and all those factors, and how do you square reparations with that?

That's a very difficult issue for us to perceive.

MR. METZ: How would I square it?

CHAIRMAN SCHNEIDER: Yes.

MR. METZ: I think there are two alternatives, or three alternatives, because if you don't you can go into court; you can go into reparations.

CHAIRMAN SCHNEIDER: How does he go to reparations if he's precluded, if the FCM has an agreement which says that he must go to arbitration and if the FCM will not accept him as a customer under any other circumstance?

MR. METZ: I meant to say he had three alternatives, go to court, reparations or arbitration. One of those alternatives, by his agreeing, signing, to an arbitration agreement, if enforced would put him in arbitration.

CHAIRMAN SCHNEIDER: But he has no alternative. What you've said is you've boxed him into arbitration by saying, one he must sign that agreement and two, if he doesn't sign that agreement you won't accept him as a customer.

I submit to you if Merrill and Shearson take that position and the rest of the industry takes that position, then no customer will ever be in a position where he can be in anything other than arbitration.

How does he ever get to reparations?

MR. RUSSO: It's particularly true in cities and towns where you might only have one particular brokerage firm where you just don't have the opportunity you might have in

New York to shop around for that particular brokerage firm that's going to let you x out a particular clause.

MR. METZ: If I can go back. We're talking about two things now. We're talking about one, the definition of voluntary which you have taken the position to mean only after an act occurs or a claim arises.

Secondly, you've taken the position that existing contracts which are drawn, shall be declared null and void at a specific time, one year after the regulations become effective.

I'm suggesting to you that any aspect along that line raises serious questions as to whether you can do that.

CHAIRMAN SCHNEIDER: Commissioner Dunn?

COMMISSIONER DUNN: No. He still hasn't answered the question.

CHAIRMAN SCHNEIDER: Commissioner Dunn doesn't feel you've answered the question. Do you want to try and pursue it?

MR. METZ: No.

CHAIRMAN SCHNEIDER: Okay. Steve, thank you very much. I appreciate your coming and taking the time to give us this testimony.

We'll stand adjourned until 2:00 o'clock, at which time the American Arbitration Association has graciously agreed to come on this afternoon instead of this morning,

and accordingly, we'll pick up in the afternoon at 2:00 o'clock with the two Exchanges and the American Arbitration Association.

(Whereupon, at 12:30 o'clock, p.m., the hearing was recessed to reconvene at 2:00 o'clock, p.m., this same day.)

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United States Court of Appeals
For the Second Circuit

Harold Ames

Plaintiff-Appellant

against

Merrill, Lynch, Pierce, Fenner & Smith Inc.,
and Christopher V. Streit

Defendants-Appellees

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Lowenthal Landau Fischer & Singer being duly sworn, deposes and says that he is over the age of 21 years and resides at 11 Park Place New York, New York

That on the 17th day of June 1977 at 165 Broadway New York, New York he served the annexed Brief and Appe ndix upon James J. Dolan Esq. in this action, by delivering to and leaving with said attorney 3 true copys thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 17th.
day of June 1977

Raymond J. Braddick

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19~4